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IN THE

# SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1928.

No. 278

THE CUDAHY PACKING COMPANY, a corporation,
*Appellant,*

v.

JAY GRANT HINKLE, Secretary of State, and JOHN H. DUNBAR, Attorney General of the State of Washington,
*Appellees.*

APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION, DENYING AN INTERLOCUTORY INJUNCTION, AND DISMISSING THE BILL OF COMPLAINT OF APPELLANT.

## BRIEF OF APPELLEE

JOHN H. DUNBAR,
*Attorney General of the State of Washington.*

L. B. DONLEY,
*Assistant Attorney General of the State of Washington.*

*Solicitors for Appellees.*

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

JAY THOMAS, PUBLIC PRINTER, OLYMPIA, WASH.

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CONTENTS.


| | Page |
|---|---|
| Statement of the Case | 7 |
| Argument | 8–34 |
| I. The doctrine of the case of Baltic Mining Company v. Massachusetts, 231 U. S. 68, has not been overruled | 8–26 |
| II. Cases involving excise taxes sought to be collected by a state from a corporation engaged solely in interstate commerce are not in point as is true where no maximum tax is fixed | 26–28 |
| III. The Washington excise tax on corporations engaged in intrastate commerce is reasonable in amount and has a reasonable maximum | 28–32 |
| IV. Some of the later state cases do not recognize the rule permitting reasonable taxes | 32–34 |
| Conclusion | 35 |

## CASES CITED.


Page

Airway Corporation v. Day, 266 U. S. 71.....21–22, 35

Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203.....20–21, 28, 32, 33

Atcheson, Topeka & Santa Fe Railway Co. v. O'Conner, 223 U. S. 280..... 9

Baltic Mining Co. v. Massachusetts, 231 U. S. 68.. .....8, 10–11, 13–15, 21–23, 25–27, 29–30, 32, 35

Buck Stove Co. v. Vickers, 226 U. S. 205..... 9, 28

Cheney Brothers Co. v. Massachusetts, 246 U. S. 147 28

Cudahy Packing Co. v. Hinkle, et al., 24 Fed. Rep. (2d), 124 .....15–20

Great Northern Railway Co. v. Washington, 147 Wash. 630, 267 Pac. 506..... 34

International Paper Co. v. Massachusetts, 246 U. S. 135 .....26–27, 30–31

International Text Book Co. v. Pigg, 217 U. S. 91.. 9, 28

Kansas City, etc. Ry. Co. v. Botkin, 240 U. S. 227..12–13

Kansas City, etc. Co. v. Styles, 242 U. S. 111..... 12

Locomobile Co. v. Massachusetts, 246 U. S. 146.... 27

Looney v. Crane Co., 245 U. S. 178.....22–25, 27

Ludwig v. Western Union Tel. Co., 216 U. S. 146... 9

Minnesota Steel and Machinery Co. v. Crockett, 263 Pac. (Utah) 926..... 33

O'Gara Coal Co. v. Emerson, 326 Ill. 18..... 33

Perkins Manufacturing Co. v. Jordan, 254 Pac. 551 32

Pullman Co. v. Kansas, 216 U. S. 56..... 9

Roberts & Schaefer Co. v. Emerson, 271 U. S. 50... 33

St. L. & S. W. Ry. Co. v. Arkansas, 235 U. S. 350... 12

Virginia Railway Signal Co. v. Virginia, 246 U. S. 500..... 12

Western Union Tel. Co. v. Kansas, 216 U. S. 1 .....8, 9, 11–12, 22–23, 25, 27

## STATUTES CITED.


| | Page |
|---|---|
| Section 3836, Remington's Compiled Statutes of Washington, 1922 | 29 |
| Section 3841, Remington's Compiled Statutes of Washington, 1922 | 8 |
| Section 4831, Remington's Compiled Statutes of Washington, 1922 | 29 |
| Chapter 149, Laws of Washington, Extraordinary Session 1925 | 8, 28 |
| Sections 1 and 2, Chapter 149, Laws of Washington, Extraordinary Session 1925 | 29 |
| Section 3, Chapter 149, Laws of Washington, Extraordinary Session 1925 | 29 |
| Article VIII, Section 3 (Commerce Clause) Federal Constitution | 25 |
| Fourteenth Amendment to the Federal Constitution | 25 |

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## BRIEF OF APPELLEE

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### STATEMENT OF THE CASE.

We have nothing to add to the facts stated by appellant. These facts are a substantial setting forth of the principal allegations of the complaint of appellant as set forth on pages 1 to 19, inclusive, of the transcript of record.

## ARGUMENT.

Briefly, it is the contention of the appellees that the act in question (ch. 149, L. Washington, Ex. Sess. 1925), amending section 3841, Remington's Compiled Statutes of Washington, 1922, is a reasonable exercise of the taxing power of the state upon the appellant as an excise tax for the privilege of doing business within the state of Washington; that the amount of the tax is reasonable and the basis thereof is reasonable inasmuch as a reasonable maximum is provided beyond which the tax may not go; that this is a case involving a corporation engaged in intrastate business, as well as interstate business, and that for this reason many of the cases cited by appellant are not in point; and that the tax in question is one of the most reasonable taxes of its kind which has been passed by any of the several states.

### I.

THE DOCTRINE OF THE CASE OF *Baltic Mining Company v. Massachusetts,* 231 U. S. 68, HAS NOT BEEN OVERRULED.

A consideration of the numerous cases before this court relative to the validity of state excise taxes upon corporations where such corporations are engaged in both interstate and intrastate business shows that these cases may be divided into three separate classes.

The first grouping of cases is that headed by the case of *Western Union Tel. Co. v. Kansas,* 216 U. S.

1, a case holding that a state statute is invalid which requires as a prerequisite to the doing of business in a state by a foreign corporation engaged in both interstate and intrastate business, that such corporation pay a fee gradated in accordance with its capital stock and with no provision for a maximum amount of such tax to be paid. In that case the tax sought to be collected was in excess of $20,000.00 per year. This same rule is followed and affirmed in the case of *Pullman Co. v. Kansas,* 216 U. S. 56, and *Ludwig v. Western Union Tel. Co.,* 216 U. S. 146. The same rule was also affirmed and followed in the following cases:

*International Text Book Co. v. Pigg,* 217 U. S. 91;

*Atcheson, Topeka & Santa Fe Ry. Co. v. O'Conner,* 223 U. S. 280;

*Buck Stove Co. v. Vickers,* 226 U. S. 205.

In all of these cases the rule is laid down, and we do not believe it has ever been departed from, that where an excise tax is charged a foreign corporation by one of the several states as a prerequisite to doing business, such tax being based upon the authorized capital stock of such corporation and no reasonable maximum is provided, then such tax is invalid as constituting a direct burden upon interstate commerce. We believe this rule to be a correct statement of the law.

However, there is a second line of cases announcing a modification of the above rule in certain cases.

This line of cases is headed by the case of *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68. This is the first and leading case in support of our proposition that an excise tax may be gradated according to the amount of the authorized stock of a corporation, and if a reasonable maximum is fixed, such law will be upheld as a reasonable exercise of the taxing power of the state and will not be held to be a burden upon interstate commerce. The statute considered in the *Baltic Mining Company* case, *supra,* provided by its terms that every foreign corporation was required as a prerequisite to doing business in the state of Massachusetts to pay an excise tax of one-fiftieth of one per cent. of the par value of its authorized capital stock, with the express provision, however, that such excise tax should not in any one year exceed the sum of $2,000.00.

This court held expressly that the mere fact that a corporation is engaged in interstate business, as well as intrastate business, does not exempt its property from taxation; that the state has a right to exclude a foreign corporation from doing business within its borders so long as no principle of the Federal Constitution is violated; and that the state may prescribe conditions upon which a corporation may continue to do business in the state unless some constitutional right is denied in the exclusion thereof. It is further held that under the Massachusetts statute considered therein the tax must be construed as strictly an excise tax for the privilege of transacting

business within the state and for benefit of the protection of the laws thereof. It is further held that the several states may impose excise taxes upon corporations for the privilege of doing business within its borders and having the benefit of the protection of the laws thereof in cases where such corporations are not exclusively engaged in interstate commerce, and that such a tax is not a direct burden upon interstate commerce. The Massachusetts statute was sustained and held to be not in violation of the Constitution of the United States, and the earlier cases of the first group above cited are expressly distinguished, the court using the following language (p. 85):

"Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases. * * * A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the state, has been sustained."

A careful reading of the earlier cases above cited, beginning with the case of *Western Union Tel. Co. v. Kansas,* 216 U. S. 1, makes it plain that the only distinction between the Kansas statute, disapproved by this court, and the Massachusetts statute, approved by this court in the case of *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68, *supra,* is that there was no reasonable maximum provided for in the Kansas

statute, and there was a reasonable maximum provided for in the Massachusetts statute. No other distinction between the statutes is possible. This case is followed and approved in a number of cases in this court.

*St. L. & S. W. Ry. Co. v. Arkansas,* 235 U. S. 350;

*Kansas City, etc., Ry. Co. v. Botkin,* 240 U. S. 227;

*Kansas City, etc. Co. v. Styles,* 242 U. S. 111;

*Virginia Railway Signal Co. v. Virginia,* 246 U. S. 500.

In the case of *Kansas City etc. Ry. Co. v. Botkin,* 240 U. S. 227, the court had under consideration the corporation excise tax of the state of Kansas. This statute provided for an excise tax to be gradated according to the paid-up capital stock of the foreign corporation involved. The only material distinction between this statute and that discussed in the case of *Western Union Tel. Co. v. Kansas,* 216 U. S. 1, is that the latter statute provided that the fee should in no event exceed the sum of $2,500.00 in any one year, which provision was not in the earlier statute. The latter statute was upheld by this court as a reasonable exercise of the taxing power, and in discussing this matter, the court said (*Kansas City, etc. Ry. Co. v. Botkin,* 240 U. S. 227, p. 235):

"In the present case, the tax is not laid upon transactions in interstate commerce, or upon receipts from interstate commerce either separately or intermingled with other receipts. It does not fluctuate

with the volume of interstate business. It is not a tax imposed for the privilege of doing an interstate business. It is a franchise tax—on the privilege granted by the state of being a corporation—and while it is graduated according to the amount of paid up capital stock, the maximum charge is $2,500.00 in the case of all corporations having a paid up capital of $5,000,000.00 or more. This is the amount imposed in the present case, where the corporation has a capital of $31,660,000.00. We find no ground for saying that a tax of this character thus limited is in any sense a tax imposed upon interstate commerce. * * * Undoubtedly, a tax may be in form a privilege tax, and yet, in substance, may be a tax on property. But the present tax cannot be regarded as a property tax at all."

This rule is pursuant to the rule laid down in the case of *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68, wherein the court lays down the following fundamental principles (p. 82-83):

"* * * The mere fact that a corporation is engaged in interstate commerce does not exempt its property from state taxation. *United States Express Co. v. Minnesota,* 223 U. S. 335, 344. It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the state, has been sustained. *Maine v. Grand Trunk Railway Co.,* 142 U. S. 217; *Provident Institution v. Massachusetts,* 6 Wall. 611; *Hamilton Co. v. Massachusetts,* 6 Wall. 632; *Flint v. Stone-Tracy Co.,* 220 U. S. 107, 162-5; *United States Express Co. v. Minnesota, supra.*

"The right of a state to exclude a foreign corporation from its borders, so long as no principle of the

Federal Constitution is violated in such exclusion, has been repeatedly recognized in the decisions of this court, and the right to prescribe conditions upon which a corporation of that character may continue to do business in the state, unless some contract right in favor of the corporation prevents or some constitutional right is denied in the exclusion of such corporation, is but the correlative of the power to exclude. *Hammond Packing Co. v. Arkansas,* 212 U. S. 332, 343; *Southern Pacific Co. v. Denton,* 146 U. S. 202; *Barron v. Burnside,* 121 U. S. 186; *Insurance Co. v. Morse,* 20 Wall. 445; *Herndon v. Chicago, Rock Island & Pacific Ry. Co.,* 218 U. S. 135. For example, a state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law, or you may transact business in interstate commerce subject to the regulatory power of the state. To allow a state to exercise such authority would permit it to deprive of fundamental rights those entitled to the protection of the Constitution in every part of the Union. * * *"

In discussing the effect of the provision limiting the maximum tax to be collected to $2,000.00 per annum, the court concludes (p. 87):

"Further, the Massachusetts statute limits the tax to a maximum of $2,000.00. The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the state. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable."

The appellant contends that the doctrine announced in the *Baltic Mining Co.* case, and followed by other cases, as hereinabove set forth, has been abandoned and overruled by later cases. In discussing this phase of the case Judge Cushman of the District Court, in his opinion in the case at bar—*Cudahy Packing Co. v. Hinkle, et al.,* 24 Fed. Rep. (2d), 124, quoting from page 127-30 uses the following language:

"Plaintiff's case comes to this: Unless the case of *Baltic Mining Co. v. Massachusetts,* and the *White Mfg. Co. v. Massachusetts,* 231 U. S. 68, often spoken of as the *Baltic Mining Co.* case, have been overruled in so far as they would apply to a case such as the present, plaintiff cannot prevail.

"It is contended that the case is overruled by the following: *Looney v. Crane Co.,* 245 U. S. 178; *International Paper Co. v. Massachusetts,* 246 U. S. 135; *Cheney Bros. Co. v. Massachusetts,* 246 U. S. 147; *Air-Way Elec. Appliance Corp. v. Day,* 266 U. S. 71; *Alpha Portland Cement Co. v. Massachusetts,* 268 U. S. 203; *Hanover Fire Ins. Co. v. Carr,* 272 U. S. 494.

"First, the contention is that the *Baltic Mining Co.* case, in which the excise tax measured by the authorized capital stock with a maximum of $2,000.00 was upheld, in a suit by a foreign corporation engaged in interstate and intrastate business in the taxing state, has been expressly overruled by *Alpha Portland Cement Co. v. Massachusetts,* 268 U. S. 203. In the latter case the court said:

" 'It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation

of property beyond the state's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of the *Baltic Mining Co. v. Mass.*, 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved.'

"The Alpha Portland Cement Company was engaged solely in interstate commerce, and any license fee or tax was for that reason bound to be a charge or burden upon such commerce. Courts have many times had occasion to say, in effect, that in considering the language used in a decision, the particular point considered should always be borne in mind. The court called attention to this subject in the *Baltic Mining Co.* and *S. S. White Mfg. Co. v. Commonwealth of Massachusetts:*

" 'Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases.'

"In the case of *Air-Way Corp. v. Day, supra,* there was no maximum fixed for the annual license fee; the brief of appellant, page 73 of the report, shows that the attack upon the law was because there was not a reasonable limitation in the maximum amount of this fee. The appellant in that case besides using property owned by it in the state upon which it paid a general property tax, did an annual intrastate business amounting to $70,802.30; for the right of doing which business the lower court upheld an annual fee of $14,926, being about 21 per cent of the intrastate business done. Consideration was given by the Supreme Court to the amount of this charge; the court in reversing the lower court saying:

" 'The fee determined by the lower court, as well as that fixed by the state officers, is arbitrary. Without holding that such a charge must be measured by the value of the privilege for which it is

imposed; it may be said that some relation to such value is a reasonable requirement. Indeed, under the constitution and laws of Ohio, a tax on value of the privileges and franchises cannot exceed the reasonable value of the privilege or franchise originally conferred or its continued annual value thereafter. *Southern Gum Co. v. Laylin,* 66 Ohio St. 578. That value depends on the "property owned and used and business transacted" in Ohio. Sec. 8728-11.'

"In the instant case, for the right to do an annual intrastate business in Washington, which if the negative pregnant rule be applied, approximates $662,500, it is asked to pay an annual license fee of $580.00. It is obvious, other things being equal, that there is far less danger of such a fee or tax,—less than 1-10 of 1 per cent, upon the intrastate business transacted becoming a burden upon plaintiff's interstate business than was true in the foregoing case.

"In *Cheney Bros. Co. v. Massachusetts,* 246 U. S., 147, the act regulating the amount of an excise tax for doing business by the par value of its authorized capital stock with a maximum of $2,000, upon such tax, the same sections of the Massachusetts law were considered by the court that it had considered in the *Baltic Mining Company* case, and were held valid as to those corporations doing both local and interstate business and void as to a company solely engaged in interstate business. Of one of the companies doing an interstate and local business, it was said:

" 'This company was incorpated under the laws of Minnesota, operates flour mills there, and sells the flour to wholesale dealers throughout the country. It has an office in Massachusetts where it employs several salesmen for the purpose of inducing local tradesmen to carry and deal in its flour. These salesmen solicit and take orders from retail dealers and turn the same over to the nearest wholesale dealer, who fills the order and is paid by the retailer. Thus the salesman, although not in the employ of the wholesaler, is selling flour for him. Of course this

is a domestic business,—inducing one local merchant to buy a particular class of goods from another,—and may be taxed by the state regardless of the motive with which it is conducted.'

"In *International Paper Co. v. Massachusetts,* 246 U. S. 135, a statute of Massachusetts removing such $2,000.00 limit on the maximum amount of such excise tax was held invalid, the suit being one by a foreign trading corporation largely engaged in interstate commerce, and whose business and property was largely in other states.

"In this case, the court said of the *Baltic Mining Company* case:

" 'In holding otherwise the state court failed to observe the restricted and limited grounds of our rulings in *Baltic Mining Co. v. Massachusetts* and the other cases dealt with and distinguished in the excerpt just quoted from our opinion in *Looney v. Crane Company.* True, the tax sustained in *Baltic Mining Co. v. Massachusetts* was imposed under the first of the statutes now in question, the one of 1909; but at that time the statute placed a maximum limit on the amount of tax which as shown in that and other cases, was a material factor in the decision.'

"In *Looney v. Crane Co.,* 245 U. S. 178, a Texas statute imposing upon corporations permit charges and excise taxes, both charges being without a maximum fixed as to their amount, in a suit by a foreign trading corporation engaged largely in interstate business, was held invalid. This case follows the rule laid down in *Western Union Telegraph Co. v. Kansas,* 216 U. S. 1; *Pullman Co. v. Kansas,* 216 U. S. 56; *Ludwig v. Western Union Telegraph Co.,* 216 U. S. 146; *International Textbook Co. v. Pigg,* 217 U. S. 91; *A. T. & S. F. Ry. Co. v. O'Connor,* 233 U. S. 280, 285.

"Of cases including the *Baltic Mining Company* case, the court in *Looney v. Crane Company* said:

" 'But despite the controlling decisions dealing with cases in substance identical in fact and principle

with the case here presented and the effect given to them in Texas as to one of the statutes here involved, it is now insisted that the statutes are repugnant to the Constitution of the United States and that error was committed in deciding to the contrary. This is rested on cases decided since those to which we have referred. *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68; *St. Louis Southwestern Ry. Co. v. Arkansas,* 235 U. S. 350; *Kansas City, Fort Scott & Memphis Ry. Co. v. Kansas,* 240 U. S. 227; *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles,* 242 U. S. 111. The proposition is, therefore, that these cases overruled the previous decisions. The incongruity of the contention will be manifest when it is observed that not only did the case relied upon contain nothing expressly purporting to overrule the previous cases, but on the contrary in explicit terms declared that they did not conflict with them and that they proceeded upon conditions peculiar to the particular cases.'

"The court held that the *Baltic Mining Company* case and other cases mentioned by it, did not overrule the *Western Union Telegraph Co.* and other cases. It follows that the cases relied upon as overruling the *Baltic Mining Co.* case, unless they go farther than the earlier cases, do not do so. *Hanover Fire Ins. Co. v. Harding,* 272 U. S. 494, has no bearing upon the present question, In the case of *Roberts and Schaefer Co. v. Emmerson,* 271 U. S. 50,—the *Baltic Mining Company* case was not mentioned, furthermore, that was a domestic corporation doing a purely intrastate business and the tax attacked was upheld. The court said:

" 'We cannot say that the value of the corporation franchise may not be measured by the number of no-par shares which may be issued rather than their value when issued.'

"The Supreme Court has also said, in *Hump Hairpin Co. v. Emmerson,* 258 U. S. 290:

" 'While a state may not use its taxing power to

regulate or burden interstate commerce (*United States Express Co. v. Minnesota,* 223 U. S. 335; *International Paper Co. v. Massachusetts,* 246 U. S. 135), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal consitutional rights. As coming within this latter description, taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund (not wholly derived from such commerce), that the principle of the cases so holding must be regarded as a settled exception to the general rule. *Maine v. Grand Trunk Ry. Co.,* 142 U. S. 217; *Wisconsin & Michigan Ry. Co. v. Powers,* 19 U. S. 279; *Flint v. Stone Tracy Co.,* 220 U. S. 107; *United States Express Co. v. Minnesota,* 223 U. S. 335; *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68; *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles,* 242 U. S. 111; *United States Glue Co. v. Oak Creek,* 247 U. S. 321, 326-327. The turning point of these decisions is, whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it.' "

We now come to a discussion of the third line of cases upon which appellant relies in the case at bar. Appellant, in its brief, relies principally upon the case of *Alpha Portland Cement Co. v. Massachusetts,* 268 U. S. 203, and particularly that portion thereof wherein the court says (p. 218):

"The amount demanded is unimportant where there is no legitimate basis for the tax. So far as

the language of *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68 * * * tends to support a different view, it conflicts with conclusions reached in later opinions, and is now definitely disapproved."

This language, if considered independently and without reference to the case in which it appears and the peculiar facts and circumstances of that case, might well be considered as an overruling of the *Baltic Mining Co.* case, and the doctrine therein expressed upholding the validity of an excise law providing for a graduated corporation excise tax. However, in discussing the facts of the case, Judge Cushman in his opinion in the case at bar, 22 Fed. (2nd), page 124, uses the following language (p. 128):

"The Alpha Portland Cement Company was engaged solely in interstate commerce, and any license fee or tax was for that reason bound to be a charge or burden upon such commerce. Courts have many times had occasion to say, in effect, that in considering the language used in a decision, the particular point considered should always be borne in mind."

So, then, we find that the *Alpha Portland Cement Company* case, *supra,* relied upon by appellant, is only authority for the proposition that where a foreign corporation is engaged solely in interstate commerce, the several states may not impose an excise tax upon it as a prerequisite to its engaging in such interstate commerce, and that the *Baltic Mining Company* case, in so far as it might affect such a situation, is expressly overruled.

Reliance is placed in the case of *Airway Corporation v. Day,* 266 U. S. 71. An examination of this

case shows that there was no maximum, reasonable or otherwise, fixed for the annual license fee, and that for this reason it was held to be unreasonable. The facts as shown in the opinion indicate that the state of Ohio was attempting to collect a tax of $14,926.00 from this corporation which was doing an intrastate business amounting to only $70,802.30 per annum. An examination of all the cases relied upon by the appellant as overruling the doctrine of the case of *Baltic Mining Co. v. Massachusetts, supra,* shows that this court has never held a corporation excise tax of any of the several states to be invalid where such tax was graduated in accordance with the authorized capital stock of the corporation, and where the corporation was engaged in intrastate business, and *where a reasonable maximum fee was provided for in the statute.*

The case of *Looney v. Crane Co.,* 245 U. S. 178, is a case in all respects similar to the case of *Western Union Tel. Co. v. Kansas,* 216 U. S. 1, *supra.* The tax there under consideration imposed by the state of Texas levied an excise tax upon foreign corporations based upon the authorized capital stock of such corporations. This tax was held to be a burden upon interstate commerce. The distinguishing point between the *Looney* case *supra,* and the *Baltic Mining Company* case, *supra,* is that the Texas statute made no provision whatever for a maximum fee, reasonable or otherwise, and that the Crane Company, with an authorized capital of $17,000,000.00, and with sur-

plus and undivided profits of $8,130,000.00 was by the act required to pay an annual tax which amounted to approximately $17,000.00. In this case the court discusses the proposition that the *Baltic Mining Company* case, and its companion cases, have the result of overruling the case of *Western Union Tel. Co. v. Kansas, supra,* and companion cases hereinbefore discussed, and in disposing of this question the court says (*Looney v. Crane,* 245 U. S. 178—quoting from page 189):

"It is now insisted that the statutes are not repugnant to the Constitution of the United States and that error was committed in deciding to the contrary. This is rested on cases decided since those to which we have referred. *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68; *St. Louis Southwestern Ry. Co. v. Arkansas,* 235 U. S. 350, *Kansas City, Fort Scott & Memphis Ry. Co. v. Kansas,* 240 U. S. 227; *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles,* 242 U. S. 111. The proposition is, therefore, that these cases overruled the previous decisions. The incongruity of the contention will be manifest when it is observed that not only did the cases relied upon contain nothing expressly purporting to overrule the previous cases, but on the contrary in explicit terms declared that they did not conflict with them and that they proceeded upon conditions peculiar to the particular cases.

"The demonstration of error in the argument which results from this situation might well cause us to go no further in its consideration. In view, however, of the gravity of the subject to which the argument relates and the misconception and resulting confusion in doctrine which might result from silence, we briefly notice it. In the first place it is

apparent in each of the cases that as the statutes under consideration were found not to be on their face inherently repugnant either to the commerce or due process clause of the Constitution, it came to be considered whether by their necessary operation and effect they were repugnant to the Constitution in the particulars stated, and this inquiry it was expressly pointed out was to be governed by the rule long ago announced in *Postal Telegraph Cable Co. v. Adams,* 155 U. S. 688, 698, that 'The substance and not the shadow determines the validity of the exercise of the power.' In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes with the Constitution which was found to exist resulted from particular provisions contained in each of them which so qualified and restricted their operation and necessarily so limited their effect as to lead to such result. These conditions related to the subject-matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied. It is thus manifest on the face of all of the cases that they in no way sustained the assumption that because a violation of the Constitution was not a large one it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Consitution.

"It follows, therefore, that the cases which the argument relies upon do not in any manner qualify the general principles expounded in the previous cases upon which we have rested our conclusion, since the later cases rested upon particular provissions in each particular case which it was held caused the general and recognized rule not to be applicable."

From the foregoing it must be apparent that the

basic principles of law announced in the earlier cases of the group headed by the case of *Western Union Tel. Co. v. Kansas,* 216 U. S. 1, are not affected in any manner by the case of *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68, and companion cases thereto, and that these cases, in turn, and the basic principles therein set forth, are not in any manner affected or overruled by the case of *Looney v. Crane,* 245 U. S. 178, and cases classified therewith by the appellant in its brief. We believe these three groups of cases are readily distinguishable upon the facts, and that this court has so distinguished them. The basic principle announced in the earlier line of cases is that an excise tax graduated in accordance with the capital stock of a foreign corporation where no maximum is fixed, is unreasonable and in violation of the Commerce Clause and the Fourteenth Amendment to the Constitution of the United States. The basic principle in the second group of cases is that the state has the right to levy an excise tax graduated in accordance with the amount of the capital stock of a foreign corporation, and in cases where such tax is reasonable and a reasonable maximum is fixed, the tax is not objectionable to the provisions of the Constitution of the United States. The third class of cases reaffirms the rules announced in the first line of cases, and, in addition thereto, lays down the proposition more firmly, if possible, that where a corporation is engaged in a state solely in interstate business, no excise tax at all may be collected, however

small the amount may be, or by what method its amount may be determined.

We earnestly submit that the doctrine set forth in the case of *Baltic Mining Co. v. Massachusetts,* 231 U. S. 68, is a fair and complete statement of the law as it is and ought to be when applied to facts such as in the case at bar and that the case has not been overruled or modified.

## II.

### Cases Involving Excise Taxes Sought to be Collected by a State From a Corporation Engaged Solely in Interstate Commerce are not in Point as is True Where no Maximum Tax is Fixed.

A number of cases have been cited by the appellant wherein excise taxes have been by this court set aside and held invalid where the sole business of the corporation in the state was interstate as distinguish from intrastate commerce. The case of *International Paper Co. v. Massachusetts,* 246 U. S. 135, is one of these cases. In the *Baltic Mining Co.* case, *supra,* the statute of Massachusetts of 1909 was considered, and this statute, which provided for a graduated excise tax on corporations with a $2,000.00 maximum, was upheld. In the *International Paper Co.* case, *supra,* the court considered the statute of Massachusetts of 1914 relative to excise taxes on corporations, and pointed out that under the construction placed upon it by the highest state court of Mas-

sachusetts, the 1914 tax act did not provide a maximum, but provided for a graduated tax on the authorized capital of a corporation, regardless of amount and without maximum. The court held that under the peculiar provisions of the 1914 act, as interpreted by the Massachusetts court, the law came under the rules announced in the case of *Western Union Tel. Co. v. Kansas, supra, Looney v. Crane Co., supra,* and other similar cases, and the law was void as being a violation of the Commerce Clause and the Fourteenth Amendment of the Federal Consitution. The case is specifically distinguished from the *Baltic Mining Co.* case, and in this connection the court used the following language (*International Paper Co. v. Massachusetts,* 246 U. S. 135, quoting from page 145):

"In holding otherwise the state court failed to observe the restricted and limited grounds of our rulings in *Baltic Mining Co. v. Massachusetts* and the other cases dealt with and distinguished in the excerpt just quoted from our opinion in *Looney v. Crane Company.* True, the tax sustained in *Baltic Mining Co. v. Massachusetts* was imposed under the first of the statutes now in question, the one of 1909; but at that time the statute placed a maximum limit on the amount of the tax which, as shown in that and other cases, was a material factor in the decision. This limitation, as the state court holds was 'removed' by the statute of 1914, which also made a partial reduction in the tax rate."

The rule announced in the *International Paper Co.* case, *supra,* is followed by this court in the case of *Locomobile Co. v. Massachusetts,* 246 U. S. 146.

*Cheney Brothers Co. v. Massachusetts,* 246 U. S. 147, is a consolidation of seven separate and distinct cases, and each receives consideration based upon the peculiar facts of the case. In some of these seven consolidated cases the corporation in question was held to be doing entirely interstate business, and therefore not liable to the tax, while other corporations, being engaged also in intrastate business, it was held that the tax was valid and might be collected.

In the case of *International Text Book Co. v. Pigg,* 217 U. S. 91, the court held that where a statute of a state makes the payment of a fee and the filing of a statement a prerequisite to the carrying on of purely interstate business, such statute is void as being a direct burden on interstate commerce. This rule is affirmed in the following cases:

*Buck Stove Co. v. Vickers,* 226 U. S. 205;
*Alpha Portland Cement Co. v. Massachusetts,* 268 U. S. 203.

## III.

### The Washington Excise Tax on Corporations Engaged in Intrastate Commerce is Reasonable in Amount and has a Reasonable Maximum.

The Washington statute which is involved, chapter 149, Laws of Washington, Ex. Sess. 1925, is set forth in full in the brief of appellant as a part of the appendix thereto. An examination of this statute shows that in so far as corporations such as the ap-

pellant in this case are concerned, the excise fee to be paid is $100.00 for the first $1,000,000.00 capitalization, $50.00 for the second million and $10.00 for each $1,000,000.00 or fraction thereof of capital in excess of $2,000,000.00, provided, however, that the total amount of such annual license fee shall in no case exceed $3,000.00 (sec. 3, ch. 149, L. Ex. Sess. 1925, amending sec. 4831, Rem. Comp. Stat.). The law relative to the payment of filing fees provides, in so far as applicable to a corporation such as appellant, is that for the first $2,000,000.00 of capitalization, a filing fee of $750.00 shall be paid and the additional sum of $10.00 for each $1,000,000.00 or major fraction thereof of capital stock in excess of $2,000,000.00, with the proviso, however, that the total filing fee shall in no event exceed the sum of $3,000.00 (secs. 1 and 2, ch. 149, L. Ex. Sess. 1925; sec. 3836, Rem. Comp. Stat.)

The statute considered and upheld by this court in the case of *Baltic Mining Co. v. Massachusetts, supra,* provided for payment of an annual excise of one-fiftieth of one per cent of the par value of its authorized capital stock with a maximum of $2,000.00. The court further says, in the *Baltic Mining Co.* case *supra,* (p. 85) that:

"Every case involving the validity of a tax must be decided upon its own facts, and having no disposition to limit the authority of those cases the facts upon which they were decided must not be lost sight of in deciding other and alleged similar cases. * * *

"An examination of the previous decisions in this court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary effect was to burden interstate commerce or to tax property beyond the jurisdiction of the state."

The fundamental principles of law governing the case at bar have been laid down by this court in the case of *International Paper Co. v. Massachusetts*, 246 U. S. 135 (quoting from pages 141-2):

"1. The power of a State to regulate the transaction of a local business within its borders by a foreign corporation—meaning a corporation of a sister State—is not unrestricted or absolute, but must be exerted in subordination to the limitations which the Constitution places on state action.

"2. Under the commerce clause exclusive power to regulate interstate commerce rests in Congress, and a state statute which either directly or by its necessary operation burdens such commerce is invalid, regardless of the purpose with which it was enacted.

"3. Consistently with the due process clause, a State cannot tax property belonging to a foreign corporation and neither located nor used within the confines of the State.

"4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce does not prevent a State in which it has property and is doing a local business from taxing that property and imposing a license fee or excise in respect of that business, but the State cannot require the corporation as a condition of the right to do a local business therein to submit to a tax on its interstate business or on its property outside the State.

"5. A license fee or excise of a given per cent of the entire authorized capital of a foreign corpora-

tion doing both a local and interstate business in several States, although declared by the State imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property, including that in other States; and this because the capital stock of the corporation represents all its business of every class and all its property wherever located.

"6. When tested, as it must be, by its substance —its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconsitutional and void as illegally burdening interstate commerce and also as wanting in due process because laying a tax on property beyond the jurisdiction of the State."

Applying these rules to the Washington law under consideration here, we submit that if a state has the right to levy an excise tax at all upon foreign corporations engaged in intrastate commerce, as well as interstate commerce, and has the right to use as a measure for such tax the authorized capital stock of such a corporation, the Washington tax is more equitable and more reasonable than any tax considered by this court in any of the cases cited.

In the case at bar we find that the appellant corporation has an authorized capital of $45,000,000.00, of which $29,800,000.00 has been issued, and that this corporation is being required to pay an annual license fee of only $580.00, and that the filing fee for this corporation amounted only to $1,180.00. It would be necessary, before the maximum would be reached, that a corporation be capitalized in excess

of $250,000,000.00. If this court is to consider the amount of the tax and the reasonableness of the method of graduation, there seems no escape from the conclusion that the Washington tax is reasonable, just and equitable. We are unable to find in any of the later cases any receding from the rule of law laid down in the *Baltic Mining Co.* case to the effect that "every case involving the validity of a tax must be decided upon its own merits * * *."

## IV.

### Some of the Later State Cases do not Recognize the Rule Permitting Reasonable Taxes.

In a number of the states the highest courts have held that the case of *Alpha Portland Cement Co. v. Massachusetts, supra,* has the effect of overruling the doctrine announced in the *Baltic Mining Co.* case, *supra,* and have held laws similar in some particulars to the Washington law involved to be invalid. Such is the holding in the case of *Perkins Manufacturing Co. v. Jordan,* 254 Pac. 551. The law under consideration there was graduated so that a maximum fee of $1,000.00 was provided for, which maximum would be required of a corporation having a capitalization of $10,000,000.00. The California court falls into the error, as we view it, of holding the *Baltic Mining Co.* case, *supra,* to be definitely disapproved in all particulars by the case of *Alpha Portland Cement Co. v. Massachusetts, supra.* It is our contention, as we have hereinbefore set forth,

that the doctrine announced in the *Alpha Portland Cement Co.* case only applies to corporations engaged solely in interstate commerce.

The same conclusion, which we believe erroneous, is the basis of the decision in *Minnesota Steel and Machinery Co. v. Crockett,* 263 Pac. 926 (Utah).

In the case of *O'Gara Coal Co. v. Emerson,* 326 Ill. 18, the supreme court of Illinois held an excise tax upon corporations based upon all its issued capital stock without maximum fee to be invalid and unreasonable on the constitutional grounds urged in the case at bar. This case may be distinguished from the case at bar because no maximum fee was provided, and for that reason a tax upon unissued stock would necessarily be discriminatory as against a corporation of similar size which had all of its stock issued. No maximum being provided, it is also a tax upon all the property of the company, and not, as in the case at bar, a tax measured by the authorized capital stock of the corporation. The doctrine therein set forth has not received the approval of this court.

*Roberts & Schaefer Co. v. Emerson,* 271 U. S. 50.

In that case the court permitted the state to levy a tax on unissued capital stock, and the law under consideration was that of the state of Illinois. It is urged by appellant that that case had to do only with a corporation engaged in intrastate commerce. Conceding this to be true, the fact remains that this

court has held that a tax placed upon unissued, as well as issued, stock, is not invalid as being discriminatory.

The supreme court of the state of Washington, in the case of *Great Northern Railway Co. v. Washington,* 147 Wash. 630, 267 Pac. 506, has held the law under consideration to be invalid in so far as it affects common carriers engaged in interstate business. This decision is based upon the proposition that such corporations are not at liberty to withdraw from the state, and that therefore the tax is a direct burden upon interstate commerce. The court, however, adheres to the general rule that a corporation may not do business in a state which did not create it save by its consent, and that it is at liberty to withhold such consent without reason, pointing out, however, that an exception exists in the case of a foreign corporation engaged in interstate commerce and under the jurisdiction of the Interstate Commerce Commission. By inference, at least, the supreme court of Washington has held, in the case above cited, that the Washington law involved in the case at bar is constitutional and valid in so far as it affects corporations not in the same class as the Great Northern Railway Company. The court further expressly holds that the excises imposed under the Washington statute are not unreasonable.

## CONCLUSION.

We respectfully submit to the court that the doctrines laid down by the court in the *Baltic Mining Co.* case have not been overruled or superseded by later decisions, and that the five rules of law set out in the case of *Airway Corporation v. Day* clearly state the law, and that this court should uphold the right of the several states to require excise taxes from foreign corporations in cases where such excise taxes are reasonable in amount and are graduated upon the authorized capital stock of the corporation, and where a reasonable maximum is provided.

We respectfully submit that the decision of the statutory Federal court is correct and should be affirmed.

Respectfully submitted,

JOHN H. DUNBAR,
*Attorney General of the State of Washington.*

L. B. DONLEY,
*Assistant Attorney General of the State of Washington.*

*Solicitors for Appellees.*